NATIONAL WORKRIGHTS INSTITUTE

Bringing Human Rights to the Workplace

Lewis L. Maltby, President
Jeremy E. Gruber, Legal Director

Testimony of Jeremy Gruber
Legal Director
National Workrights Institute

Michigan House Bills 4532, 4887, 4926, 4927

Not so many years ago, Henry Ford maintained his own private police force. If you worked for Mr. Ford, these people would descend upon your house at any hour of the day or night. They would barge in without your consent, search your house from top to bottom, and interrogate everyone they found. If they found anything of which Henry Ford disapproved; if there was liquor in the house, if you had an overnight guest of the opposite sex, if it was Sunday morning and you weren't in church, you were fired. It didn't matter how good your work was or how loyal an employee you were; if you didn't live the way Henry Ford thought you should, you lost your job.

While Americans have long accepted that employers have a certain degree of control over what employees do while at the workplace, most are unaware of the amount of control many employers attempt to exert over their employees' private lives as well. Employers are making employment decisions based on the legal off duty conduct of their employees and prospective employees. Many employers now refuse to hire people whose private lives are deemed "unhealthy," or they charge significant penalties and a few even fire current employees who do not change their lifestyle to meet new company demands.

The driving force behind this trend is economics: Businesses have reason to worry about their employees' health because employer-sponsored health-insurance premiums have been steadily increasing and although several factors contribute to these rising costs, the only factor employers have control over is their employees. According to a 2003 survey by the American Management Association, 71 percent of executives say corporations have a "responsibility to promote wellness among employees"—which increased to 80% in 2004.[1] A 2004 survey found that 92% of employer respondents said that senior leaders in their organizations view health care costs as a serious business issue that must be addressed.

How employers are to respond to this health crises is entirely another matter. Employees are working longer hours than they ever have before. They are often available to their employers after hours, while at home, even when on vacation when they take them. Employees are under ever increasing time and financial constraints. Most employees want to be healthy and given the tools they become healthier. Voluntary wellness

[1] "More employers offering wellness programs," *Journal of Employee Assistance* Vol. 35, No. 1 (March 2005), at 32.

166 Wall Street, Princeton, NJ 08540 Tel. 609-683-0313 Fax. 609-683-1787
Lmaltby@workrights.org Jgruber@workrights.org www.workrights.org

programs are now widely used by employers, more than 80% of businesses with 50 or more employees have some form of health/wellness programs[2] and they have a very high participation rate, up to 75% according to the American Management Association. These programs when offered properly are a true win-win for employers and employees. For example Steelcase in Grand Rapids found a 53% reduction in health care costs for high risk employees through their comprehensive wellness program. The benefits of such programs go beyond money savings and include higher productivity, reduced absenteeism, less injuries, and greater morale. Most employers address rising health care costs in this way. They understand that employee health is as much their responsibility as their employees and they work to create a workplace culture that promotes health. Furthermore they understand that such properly conducted programs make good business sense.

Unfortunately, a growing number of employers, rather than work with their employees sharing both the responsibility and benefits of healthy programs are choosing to try to save health care costs on the backs of their employees by weeding out of their workforce employees that are labeled unhealthy with a combination of highly punitive assessments and outright terminations or refusals to hire such employees. Rather than improving health they are more concerned with shifting the cost burden to employees, other employers or in the end the taxpayers when such individuals are unable to find work. Indeed some companies are penalizing employees for failing to meet a certain body mass index or cholesterol rating. Weyco, for example, which is located not too far from where we are meeting today terminated employees who were unable to stop smoking.

And it is not just smokers that are affected. Every one of us does something in our private lives that affects health. For some it's an occasional drink or red meat or junk food. For others its skiing, scuba diving or riding a motorcycle. Even lying on the beach in the sun can increase the risk of skin cancer. If we permit employers to control private behavior which is unrelated to job performance simply because it affects our health, we are giving employers a blank check to control our lives twenty-four hours a day. As we move about our private lives before we make any decisions we must ask "what will my employer think?" This is not how citizens in a free society should be forced to conduct themselves.

Take Ross Hopkins, for example, he was fired for going to a bar after work because company policy prohibited alcohol use at any time, even after hours. Or perhaps Jesse Mercado, who lost his job as a paramedic because his boss thought he weighed too much. Some companies now have policies prohibiting hobbies which management considers "high risk."

[2] Wellness Councils of America, 2006 Survey

Such programs are often not based on sound actuarial data. Moreover because these policies when adopted are done so universally, they fail to account for the productivity and other financial benefits the company derives from any particular employee.

Health-related behavior is not the only area in which employers attempt to control their employees' private behavior, with free speech threatened as well. Our founding fathers adopted the Bill of Rights to limit the government's involvement in their countrymen's private lives and today modern Americans demonstrate the same unwillingness to tolerate intrusion whether by government or by corporation. Nevertheless, employees have faced termination for political and other views that their employers have disagreed with.

Take Lynne Goebbel, who was fired from her job for displaying a Kerry-Edwards bumper sticker in the rear windshield of her car or Nicholas Winset who was fired for espousing pro gun and 2nd amendment views. How about Henry Norr who was fired for attending an anti-war protest, Glenn Hiller who was terminated for speaking out at a political rally and Neal Horsley who was fired for speaking out against abortion. Lisa Bailey who worked for five months at a local university as a temp doing data entry was encouraged to apply when the job was made a salaried position, she saw a chance to lift herself out of dead-end jobs but then was turned down after a credit check. Consider, Cameron Barrett, a Traverse City Michigan IT worker who was terminated after his employer read the short stories he had written on his personal Web page, where he published his own fiction.

Taking such actions for reasons unrelated to job performance is not only unfair, its bad business and it often prevents the company from hiring or keeping the best-qualified person for the job. Too often employers are allowing their personal prejudices to cloud good business decisions.

The methods used to enforce these policies raise independent civil liberties issues. Some employers currently take an employee's word that they are not violating the rules for off-duty behavior. But many others collect information both formally and informally and still others institute policies only after finding an employee's activities objectionable. As discrimination grows more common, however, it will become more difficult to simply avoid companies with whose policies one does not comply. People will take jobs, not reveal their lifestyle, and hope the employer does not find out. When this occurs, employers will have to physically monitor people away from work and/or require frequent universal medical testing (such as urinalysis) in order to enforce the policy.

It is unfair and dangerous to allow employers to engage in this type of discrimination. It is contrary to a free society. Where do we draw the line as to what our employer can regulate? The real issue here is the individual right to lead our lives as we choose. It is important that we preserve the distinction between company time and the sanctity of our private lives. If freedom is to mean anything, it means the right to live as you choose on

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your own time as long as you obey the law. Thirty states have already acted to protect their citizen's private lives. We hope Michigan will become the 31st.

166 Wall Street, Princeton, NJ 08540
Lmaltby@workrights.org

Tel. 609-683-0313
Jgruber@workrights.org

Fax. 609-683-1787
www.workrights.org

MICHIGAN CHAMBER OF COMMERCE

To: House Labor Committee

From: Wendy Block, Michigan Chamber of Commerce WB

Date: November 6, 2007

Re: Chamber Opposes Governmental Interference in Employment Decisions

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The purpose of this memorandum is to inform you of the Michigan Chamber's opposition to House Bills 4532, 4887, 4926 and 4927, legislation to restrict Michigan job providers' employment decisions. The Michigan Chamber believes this package of bills would drastically erode Michigan's at-will employment status, invite litigation and duplicate laws, rules and regulations already on the books.

The governmental interference called for under this package of bills is unnecessary, impractical and likely to create more problems than it would solve. Specifically, we are opposed to the bills for the following reasons:

- **The bills drastically erode Michigan's at-will employment status** by creating new hiring and firing standards for Michigan employers.

- **The bills create a litigation landmine.** Under these bills, an employee could file a lawsuit against an employer for allegedly discharging or discriminating against him/her for an ever-expanding list of reasons - including being a smoker or for having a nose ring - when, in fact, that employee was let go for other reasons, such as poor job performance. Furthermore, the legislation would permit an employee alleging a violation of these bills to bring a civil suit and obtain injunctive relief and damages, costs and reasonable attorney fees. As a result, these bills would create a financial incentive for attorneys to file additional lawsuits against employers.

- **The legislation is a solution in search of a problem.** When asked at a prior Committee meeting, the sponsors of each of these bills were unable to point to a single example of why legislation was needed to prohibit employers from firing or declining to hire employees based on their credit history, physical fitness or body type or medical problems of family members. In fact, these very sponsors seemed only somewhat familiar with laws already on the books prohibiting discrimination - such as the Elliott-Larsen Civil Rights Act, the Family Medical Leave Act, or even the Fair Credit Reporting Act. The only concrete example provided was that of an Okemos firm, which gained national notoriety a few years ago when it required its employees to quit or refrain from smoking or face firing. However, even with this example, it seems this was an isolated incident. This company's policy - from our understanding - has not being widely adopted by other employers across the state of Michigan.

In addition to these concerns, there are number of practical concerns and questions surrounding this legislation:

- Specific to HB 4887 – Background checks, including credit checks, are a must in today's business climate because companies have a responsibility to know the employee. Based on the doctrine of "Negligent Hiring", employers may face liability issues if the court determines that the employer "knew or should have know" negative facts of an employee's background that should have disqualified him/her from having the job.

- Specific to HBs 4532 and 4926 - Currently, Michigan's Elliott Larsen Civil Rights Act protects individuals against discrimination based on religion, race, color, national origin, age, sex, height, weight, or marital status. House Bills 4532 and 4926 would essentially create a new protected class of individuals participating in any number of "legal" activities, including frequenting strip clubs or smoking or drinking, etc. However, there are valid reasons why an employer would not want employees to engage in these activities during non-working hours, including the fact that an employee may be a public "face" of a business or that smoking and drinking are directly linked to higher health care costs and may result in an increased likelihood that the employee will develop illnesses, including pneumonia or lung or breast cancer (thereby needing significant time off from work).

- Specific to HB 4926 – This legislation is unnecessary given the protections found in The Elliott Larsen Civil Rights Act and the Americans with Disabilities Act (ADA) for weight and obesity. The Elliott Larsen Civil Rights Act (MCL 37.2102) provides for the opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, *weight*, familial status, or marital status. Furthermore, obesity is generally a covered disability under the ADA. The regulations implementing the ADA simply and flatly state: "It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability."

- Specific to HB 4927 – This legislation is unnecessary given the protections found in The Family and Medical Leave Act (FMLA). The FMLA allows employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. The FMLA provides an entitlement of up to 12 weeks of job-protected, unpaid leave during any 12-month period to eligible, covered employees for the following reasons: 1) birth and care of the eligible employee's child, or placement for adoption or foster care of a child with the employee; 2) care of an immediate family member (spouse, child, parent) who has a serious health condition; or 3) care of the employee's own serious health condition. It also requires that employee's group health benefits be maintained during the leave. Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, nor be counted against the employee under a "no fault" attendance policy.

Thank you for the opportunity to submit to the Committee our reasons for opposing these bills. Please feel free to contact me at 517/371.7678 if you have any questions or would like to further discuss these bills.

BUCKLES & BUCKLES, P.L.C.

ATTORNEYS AT LAW

MICHAEL H.R. BUCKLES
GERALDINE C. BUCKLES

OF COUNSEL

STEVEN A. BROWN
AMBER L. DAVIS-JOHNSON
MELINDA N. DEEL
DOUG E. DOORNBOS
BONNIE D. FITCH
MICHAEL F. GOETHALS
SETH L. GOLDNER
TERRY L. HOEKSEMA
JOHN E. MELTON
JAMES M. O'REILLY
WILLIAM G. SALLOUM
DAVID C. SHEPARD
MICHAEL A. SPOELMAN
DAVID M. STIMPSON
DARRELL R. ZOLTON

MAILING ADDRESS
P.O. BOX 1150
BIRMINGHAM, MI 48012

PHYSICAL ADDRESS
17845 W. FOURTEEN MILE RD.
BEVERLY HILLS, MI 48025

TELEPHONE: (248) 647-5050
TOLL FREE: 1 (866) 729-6411
TELEFAX: (248) 647-7372
E-MAIL: STAFF@BUCKLESMG.COM

November 5, 2007

Dear Representatives,

My wife and I are attorneys who have owned and run our law practice in Michigan for over 30 years. We are both vehemently opposed to HB 4532 which, in its current form, will prohibit our firm from discriminating against tobacco users.

Our firm employs approximately 20 employees and we have had a policy for over 20 years of not hiring people who choose to use tobacco, regardless of when or where they smoke, chew, or dip. Tobacco users are nicotine addicts. Smoking and tobacco use creates serious health issues. People who use tobacco give off an offensive smell regardless of whether it is used at lunch or before work.

Moreover, addictive personalities create workplace issues. Smokers and chewers are stressed out if they do not have their tobacco. We should have the right to keep these people out of our workplace. They are not a protected class. There is no compelling reason to give them the same rights as the State of Michigan has given to people on account of race, sex, religion, etc.

I respectfully suggest that paragraph 2 include a subsection which would indicate that the law does not apply to "use of tobacco products, including, but not limited to, smoking cigarettes, cigars, pipes, or chewing or dipping tobacco."

Thank you for your understanding and consideration.

Very Truly Yours,

Michael H.R. Buckles

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Michigan Creditors Bar Association

Representative Fred Miller
795 Anderson House Office Building
Lansing, MI 48915

July 9, 2007

RE: HB 4532

Dear Representative Miller,

Thank you for taking the time to speak with me about this important legislation. As I mentioned, my wife and I do not hire smokers and we are opposed to any legislation which would prohibit us as entrepreneurs from discriminating against people who choose to smoke and use the addictive drug of nicotine.

I am interested in testifying before your committee this fall regarding this issue. Please be so kind as to keep me apprised via email and phone concerning the hearing dates. Thank you again for your time.

Very Truly Yours,

Michael H.R. Buckles
Email-Mike@Bucklesmg.com
Direct- 248-593-7110

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P. O. Box 656
Flushing, MI 48433

Phone #888-653-7133
Fax #623-533-6354
www.mcbaonline.com